

**State Bar of Michigan
Representative Assembly
September 18, 2008**

SUMMARY OF PROCEEDINGS

The following is a summary of proceedings of the State Bar Representative Assembly session held Thursday, September 18, 2008, at the Hyatt Regency in Dearborn, Michigan.

1. Call to order by Chairperson Robert C. Gardella.
2. Clerk Elizabeth Johnson declared a quorum (50) was present.
3. Matthew Abel, member of the Representative Assembly, moved to modify the calendar by moving Item #15 in front of Item #11. Upon a motion made and seconded, the calendar with the proposed amendment was adopted.
4. As provided in Rule 4.8,¹ the Summary of Proceedings of the April 12, 2008, meeting was deemed approved since no objections had been received.
5. Mr. Gardella introduced Congressman John Conyers, Chair of the United States House of Representatives Judiciary Committee, who addressed the Assembly on the new leadership that was starting in Detroit; the upcoming national elections; and the financial crisis in the nation. He described the importance of the House Judiciary Committee as the guardian of the U.S. Constitution and its 27 Amendments, and its jurisdiction over the Department of Justice.
6. Larry Nolan, member of the Representative Assembly, presented the *Michael Franck Award* to Justice Thomas E. Brennan, who is one of the Justices who voted for the Administrative Order that established the Representative Assembly in 1971. Justice Brennan accepted the award and addressed the Assembly.
7. Kathleen Oemke, member of the Representative Assembly, presented the *Unsung Hero Award* to Sue Spagnuolo-Dal of the Legal Services of South Central Michigan, who dedicated her profession to serving indigent persons. Ms. Spagnuolo-Dal accepted the award and addressed the Assembly.
8. Victoria Radke, Chair, Nominating and Awards Committee, addressed the Assembly to fill vacancies for the current meeting pursuant to Rule 6.6.² Upon a motion made and seconded the following were appointed to fill immediate vacancies within their respective Circuits: Ray Littleton of Detroit (3rd Circuit); Michael Blau of Farmington (6th Circuit); Elizabeth Sadowski of Rochester (6th Circuit); Kristin Cole of Kalamazoo (9th Circuit); Mark Quinn of Manistee (19th Circuit); Elizabeth Joliffe of Ann Arbor (22nd Circuit); Joshua Smith of Ingham (30th Circuit); Robert Hoschner of Corunna (35th Circuit); and Colin Hunter of Gaylord (46th Circuit).

¹ Rule 4.8 of the Permanent Rules of Procedure of the Representative Assembly.

² Rule 6.6 of the Permanent Rules of Procedure of the Representative Assembly.

9. Mr. Gardella addressed the Assembly by reviewing the responsibilities and duties of Assembly members as leaders of the State Bar of Michigan and their role in working with local bar associations and committees. He spoke about the State Bar's new promotional campaign *A Lawyer Helps*. He thanked the Assembly Committee Chairs and members for their work. He also introduced State Bar staff members to the Assembly and thanked them for their hard work. He also spoke to the importance of contributions to *Access to Justice* in light of the economic situation in Michigan
10. Ron Keefe, President of the State Bar of Michigan addressed the Assembly by reviewing the top four priorities that the summit meeting of State Bar Presidents agreed should be addressed by the next U. S. President, and which were submitted to both presidential candidates: Access to Justice; a fair and partial judiciary, including adequate funding for courts and judicial salaries; the independence of the Bar; and civic education in schools. Mr. Keefe reviewed the past year's activities of the State Bar, including an initiative to support an active senior Bar allowing for the expansion of pro bono services and mentoring programs; a visible commitment to the Rule of Law with lawyers standing in silence near courthouses to show solidarity with Pakistani lawyers whose country suspended the national constitution; and the State Bar's release of the National Legal Aid and Defender's Association's study of the state of indigent defense in Michigan.
11. Janet Welch, Executive Director of the State Bar of Michigan, addressed the Assembly by announcing that the State Bar reached a milestone this week by having over 40,000 active members. Give the Assembly's exclusive authority to set the amount of member dues, Ms. Welch announced that the State Bar has been fiscally prudent and is in good financial shape, and attributed this to the Bar's outstanding, quality staff. Compared with other Bars, the State Bar's dues are low, ranking 26th in the nation, but provide more value in services when compared with other State bars.
12. Mr. Abel proposed an amendment to **MCR 6.201(B)** *Preservation of Electronic Recordings*. After motions were made and seconded, with considerable deliberation and friendly amendments, the Assembly approved the amended proposal. The language of the amended proposal as approved by the Assembly now reads as follows:

RULE MCR 6.201 DISCOVERY

(B) Discovery of Information Known to the Prosecuting Attorney.

* * *

(6) any electronic recording evidence made by any governmental agency or agent pertaining to the case known to the prosecuting attorney. Such records shall be preserved by the prosecuting attorney until after all appeals have been exhausted or all rights of appeal have expired, whichever date is later. Failure to preserve such evidence will entitle the accused to a jury instruction that such evidence not produced may be presumed by jurors to have been adverse to the prosecution.

13. Joan Vestrand, member of the Representative Assembly, presented a proposal that would discourage – but not prohibit – the three officers of the Assembly from *personally endorsing candidates for political and judicial offices*. In July, the Board of Commissioners adopted a similar policy except that it discourages *all* Board members from personally endorsing candidates for political and judicial offices during their term of office. The Executive Director of the State Bar of Michigan, however, is prohibited from making such endorsements. Upon a motion made and seconded, the Assembly defeated the proposal.
14. David Carroll, Director of Research for the National Legal Aid and Defender Association, informed the Assembly of the findings of the year-long study on the status of the indigent defense systems in ten representative counties in Michigan. The study was conducted in partnership with the State Bar, and on behalf of the Michigan Legislature. The findings are as follows:
 - a. Michigan fails to uphold a meaningful right to counsel in criminal courts as required by the Sixth and Fourteenth Amendments and as set forth in the case of *Gideon v Wainwright*.³
 - b. There is no uniform oversight in Michigan and counties are free to establish any form of a right-to-counsel delivery system without regard to meeting nationally-recognized standards of justice related to caseload control, attorney training, accountability and other quality assurance standards.
 - c. Many of the systemic deficiencies identified in the 75-year-old Scottsboro Boys case⁴ still permeate the criminal courts in Michigan, including judges handpicking defense attorneys, lawyers appointed to cases for which they are not qualified, lawyers meeting clients on the eve of trial and holding discussions in public courtrooms, lawyers failing to identify obvious conflicts of interest, failures to properly prepare for trial and sentencing, violations of the ethical canon to zealously advocate for clients, inadequate compensation for those appointed to defend the accused, and a lack of sufficient time, training and resources to properly prepare for a case.
 - d. Michigan is among only seven States that put the entire burden on its counties for paying for the right to counsel. Consequently, public defender offices in financially strained counties are under-resourced. Forty-one of Michigan's 83 counties use the flat-fee system – deemed by all national standards to be the worst solution possible.
 - e. Michigan, through its counties, spends \$74.5 million a year on indigent defense services, ranking Michigan as the 44th in the nation for public defense funding, and 38% less than the national average per capita.
 - f. In assessing the status of the right to counsel in Michigan, the study used the ABA's Ten Principles—a set of fundamental standards public defense systems should meet to deliver effective, efficient, high quality, ethical, conflict-free

³ *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

⁴ *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932).

representation to accused persons who cannot afford to hire an attorney. Michigan defense systems do not follow the ABA guidelines.

15. In response to member questions, Mr. Carroll stated that the study was not designed to recommend solutions but that Oregon, Minnesota and Massachusetts have respectively provided the models that include the ABA standards for a State-funded contract system, a public defender system of government employees, and an assigned counsel system. Michigan may want to look to Montana and Wisconsin, who have recently revamped their systems.
16. In response to a member's question Ms. Welch explained that the State Bar is working at education the legislators with respect to the Constitutional issues, and is discussing the issue with the Supreme Court. Mr. Carroll then explained the example set by Louisiana, which quadrupled the amount of money spent on indigent defense even in the wake of the dire economic situation created by Katrina.
17. Mr. Abel withdrew from Assembly consideration the proposal to amend **Canon 2(F)** of the *Michigan Code of Judicial Conduct* and instead suggested that the Assembly refer the proposed amendment to the Assembly's Special Issues Committee with specific instructions to seek comments from Sections that are involved in litigation, namely Criminal Law; Family Law; General Practice; Judicial Conference; Legal Administrator; Litigation; Negligence; Prisons and Corrections; Public Corporation Law; Civil Procedure in the Courts Committee and the Criminal Jurisprudence and Practice Committee. Upon a motion made and seconded, the motion was referred to the Special Issues Committee.
18. Mr. Abel withdrew from Assembly consideration an amendment to **MCR 6.425(B) and (C)** *Providing Copies of Presentence Reports to Defendant and Defense Counsel*.
19. Under Agenda Item #17, two proposals were submitted for simultaneous consideration. Hon. Wally Kent, member of the Representative Assembly, introduced the first proposal—an amendment to **MCR 6.425(B)** *Presentence Report: Adding Information To; Adjournment Allowed When Not Timely Submitted Before Sentencing*. This amendment provides that the presentence report must be provided at least two days in advance of sentencing and that a defendant may keep copies of the report. Marty Krohner, member of the Representative Assembly introduced the second proposal—an amendment to **MCR 6.610(F)**, *Presentence Report for District Court: Adding Information To; Adjournment Allowed When Not Timely Submitted Before Sentencing*. This amendment proposes the same changes as those proposed for MCR 6.425(b), but for district court purposes. Upon a motion made and seconded, the Assembly approved both the proposals.
20. Mr. Gardella presented recognition to the Assembly's Parliamentarian, Hon. Cynthia Stephens for her dedicated voluntary work for the Assembly over the last number of years.

21. Upon a motion made and seconded, Victoria A. Radke was unanimously elected Clerk of the Representative Assembly.
22. Katherine Kakish was sworn in as 2008-2009 Chairperson of the Assembly by Hon. Michael J. Talbot, Michigan Court of Appeals.
23. Chairperson Kakish presented a plaque to Mr. Gardella for all his work over the past year as Assembly Chairperson.
24. Ms. Kakish presented clocks to the 2007-2008 Committee Chairs for their work over the past year.
25. Ms. Kakish presented certificates to the outgoing Assembly members whose terms of service expired at the end of the September 2008 Annual Meeting.
26. Adjournment at 3:37 p.m.